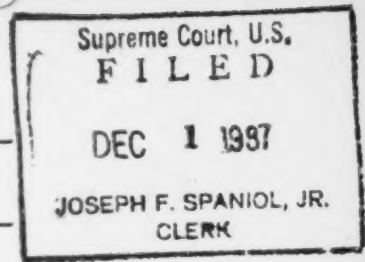


87-696

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Nr. _____



In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

SOCIETY ORDO TEMPLI ORIENTIS, et al.
Petitioners,

v.

GRADY McMURTRY, et al.
Respondents.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF
APPEALS FOR THE NINTH
CIRCUIT

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BACKGROUND

The individual Plaintiffs are longtime members of the Ordo Templi Orientis ("OTO"), a quasi mystical organization begun at the turn of the 20th Century. The individual Plaintiffs are all members of the Plaintiff entity, a California corporation, called ORDO TEMPLI ORIENTIS. The ORDO TEMPLI ORIENTIS collects annual dues from its over 700 worldwidemembers, has dozens of lodges throughout the world and throughout North America, issues a national and many local monthly newsletters, and regularly initiates new and promotes current members through its nine degrees of membership.

The Defendant SOCIETY ORDO TEMPLI ORIENTIS ("SOTO") is a Tennessee corporation which has only one member - Defendant MARCELO RAMOS MOTTA ("MOTTA"). The District Court found that SOTO is not a membership organization, did not maintain records, had no established set of procedures, conducted no financial transactions, nor initiated or promoted

members (District Court's Findings of Fact number 34, hereinafter called "Fact #").

ORDO TEMPLI ORIENTIS sued the Defendants for trademark and copyright infringement. The individual Plaintiffs sued the Defendants for libel. Among the published statements complained of were that certain Plaintiffs participated in the theft and conversion of OTO's archives, were thieves, and permitted someone to slowly starve to death. In defense SOTO claimed that it was the successor entity to the OTO and therefore entitled to use of the various marks and copyrights. MOTTA claimed that he was the head of the OTO.

The District Court found, and the Court of Appeals affirmed, that the ORDO TEMPLI ORIENTIS, and not the SOTO, is the continuation of the OTO and entitled to use of its various marks and copyrights (Fact 8, 9, & 11), that Plaintiff GRADY McMURTRY ("McMURTRY") is the OTO's present leader and that no credible evidence existed establishing that MOTTA was either the leader or had ever been initiated

into the OTO (Fact 15,16, &27), and that some of Defendants' statements were libelous while others were merely opinion or pertained to religious matters and therefor protected under the First Amendment (Fact 17-20). The District Court enjoined the Defendants from further use of OTO's marks and copyrights, awarded the individual Plaintiffs \$40,000 in general and \$100,000 in punitive damages, and ruled in favor of Plaintiffs on all of Defendants' Counterclaims.

The District Court's determination that Plaintiff ORDO TEMPLI ORIENTIS was the continuation of the OTO and that McMURTRY was the leader of the OTO was based in part on (i) he was the senior-most member, having been initiated in the 1940's, (ii) other long time members acknowledged McMURTRY as the OTO's leader, (iii) McMURTRY has been acting as the OTO's leader for a significant number of years (Fact 36), (iv) various documents evidenced a close mentor relationship between McMURTRY and Aleister Crowley, the

OTO's most well known and longest acting leader (Fact 37). One document evidenced the intent of Crowley that McMURTRY be the OTO's future leader (Fact 38), (v) In 1976, McMURTRY obtained, on behalf of the ORDO TEMPLI ORIENTIS, an Order from the Superior Court of Calaveras County, California authorizing McMURTRY to take possession of the entire archives of OTO (Fact 7), (vi) The ORDO TEMPLI ORIENTIS has a legal structure, is a membership organization, maintains records, conducts regular meetings, and initiates and promotes members (Fact 8), and (vii) there was no credible evidence that SOTO was a membership organization, maintained records, conducted meetings, initiated or promoted members, had members other than MOTTA, that MOTTA had ever been made a member, or that SOTO had ever received from OTO the charter necessary for initiating members (Fact 33,34, &35). Motta was not a credible witness and admitted to lying under oath in his case entitled Motta v. Samuel Weiser, Inc. 598 F. Supp. 941 (D.Maine 1984), aff'd 768 F.2d 481

(1st Cir.), cert. denied. ____ U.S. ____ (Dec 16, 1985) (Fact 27). In fact, the District Court's opinion of Motta in Samuel Weiser was of a "dissembler". MOTTA's entire case rested on his interpretation of a letter received by him from Crowley's immediate successor in which MOTTA is called a "Follower", a term which carries no special significance in the OTO. Additionally, MOTTA was unable to rebut the clear inference of a letter sent to him by Crowley's successor shortly before the successor's death offering to initiate MOTTA as a lower echelon member if MOTTA agreed to do certain things. MOTTA admitted to never having received this letter and, consequently never performed the prerequisite acts to membership. Additionally, no present OTO members recognize MOTTA as a member not do the OTO membership ledgers show that MOTTA was ever a member.

ARGUMENT IN OPPOSITION TO PETITION

Plaintiffs oppose the instant Petition for the following reasons:

(1) The result reached by the Courts below was fair and correct;

(2) None of the justifications for granting the Writ, as provided in Supreme Court Rule 17.1, are remotely applicable;

(3) The Defendants had no rights violated by the opinion of the Court of Appeals;

(4) Judgment was not based upon a determination of "Church Doctrine";

(5) A proper standard of review was applied;

(6) The Courts below adequately stated the Bases for their Decisions; and

(7) The First Amendment does not protect the Defendants' libel.

I THE RESULT REACHED BY THE COURTS BELOW WAS FAIR AND CORRECT.

The results reached below were fair and correct. As summarized above, the evidence presented by Plaintiffs, particularly in contrast to the Defendants' inability to present any credible evidence, make the Judgment the only one which was possible based upon all the evidence and the parties' credibility and lack thereof. MOTTA was the only witness for the Defendants. Additionally, there is no question that the type of libelous and criminal accusations which the Defendants were printing in their books and distributing nationwide was actionable and defenseless.

II NONE OF THE JUSTIFICATIONS FOR GRANTING THE WRIT, AS PROVIDED IN SUPREME COURT RULE 17.1, ARE REMOTELY APPLICABLE.

In upholding the District Court, the Court of Appeals created no conflicts with other Courts inasmuch as the District Court decision was based primarily on the facts of the case and not upon interpretations of

existing law. The decision was so absolutely justified and logical that the Supreme Court's power of supervision is simply not called into play. None of the justifications provided in Rule 17.1 are applicable to this Petition.

III THE DEFENDANTS HAD NO RIGHTS VIOLATED BY THE OPINION OF THE COURT OF APPEALS.

The Petition mischaracterizes the District Court's Additional Findings of Fact and Conclusions of Law (hereinafter "Additional Findings") as "exparte communications" between the District and Appellate Courts in order to decry that they were not permitted to file their third brief with the Court of Appeals. Indeed, the matter stood submitted by both parties when the Court of Appeals requested the Additional Findings inasmuch as all briefs had been submitted and oral arguments had been concluded. It is submitted that such Additional Findings were sought only to enable the Court of Appeals to fully determine the bases for the District Court's Judgment.

The Additional Findings do not alter, in the least, the District Court's Judgment or its bases therefor. Additionally, the Defendants should not have the opportunity to readress arguments raised in its two prior briefs nor to make new arguments not previously raised.

IV JUDGMENT WAS NOT BASED UPON A DETERMINATION OF "CHURCH DOCTRINE".

The instant case largely involved property rights and libel. Indeed, both parties' described the action in this manner in their Joint Pretrial Statement, and the Defendants, in their Proposed Findings of Fact, described the OTO as "primarily the administrative and material branch" of the members philosophical and religious beliefs (Conclusion of Law 38).

Thus, the District Court was not called upon, and did not, "effect" the OTO's succession. Rather, the District Court recognized that, for a number of secular reasons, McMURTRY had been acting as OTO's leading representative for over ten years, that he was the senior-most member and recognized by his fel-

low members as their spokesperson, that he had previously been granted authority to oversee the OTO in the United States, that he had numerous letters from Aleister Crowley implying his future leadership, and that he had been granted possession of OTO's property by order of the Calaveras County Superior Court. In making its determination, the District Court did not inquire into the OTO's internal doctrines in order to "determine" or "elect" McMURTRY as the OTO's chief spokesperson. Indeed, just the opposite was true inasmuch as MOTTA was unable to muster any evidence substantiating his claimed role in the OTO so that no need developed for the District Court to review OTO's doctrines as if there had been a valid dispute between two bonafide contestants. Jones v. Wolf 443 U.S. 595 (1979) is directly on point inasmuch as it sanctions the District Court's determination of the entitlement to OTO's property by reviewing secular documentary evidence and testimony. Indeed, it is arguable that internal regula-

tions regarding successorship are reviewable by the Court in a purely secular manner Jones at 604. Yet even if a Court were not allowed to make such a review it would have to have deferred its decision to the "... highest court of a hierarchical church organization..." Jones at 602. In such a case MOTTA has no standing as an OTO member inasmuch as no OTO members recognize him as a member. In such a situation "...legal tribunals must accept such decisions as final and as binding." Serbian Orthodox Diocese v. Milivojevich 426 U.S. 696 (1976) citing Watson v. Jones 13 Wall. 679, at 727.

The District Court very makes very clear that its determination was based only on secular matters (Conclusions of Law 24-30). The Additional Findings also state that the Defendants did not assert their First Amendment claims (except as a defense to the libel claims) until after entry of the District Court's Findings and Conclusions. It is axiomatic that such matters not raised and

litigated at trial may not be raised and argued for the first time on appeal.

V A PROPER STANDARD OF REVIEW WAS APPLIED.

As stated above, the District Court did not not consider "church doctrine" in determining the issues in this case. But even if it had, no basis exists and none is cited for the proposition that such a determination had to be made "beyond a reasonable doubt." Yet, even if this standard was applicable the result would have been the same inasmuch as the evidence was weighted so heavily in favor of the Plaintiffs if only by virtue of the Defendants inability to offer any documentary evidence of their claim to succession.

VI THE COURTS BELOW ADEQUATELY STATED THE BASES FOR THEIR DECISIONS.

The Courts below have adequately set forth the reasons and bases for their conclusions as required by Irish v. United States (9 Cir. 1955) 225 F2d 3, Fluor Corp. v. United States ex-rel Mosher Steel Co. (9 Cir. 1969) 405 F2d 823. The Courts have made "... brief, definite, pertinent findings and conclusions

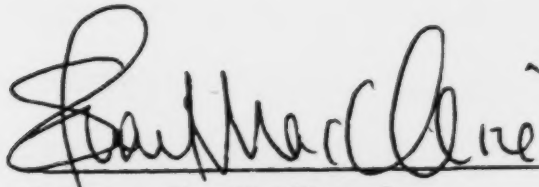
upon the contested matter" 1946 Advisory Committee to FRCP 52. As stated in Peterson & Lighterage & Towing Corp. v. New York Central R.R. (CA 2d 1942) 126 F2d 992, 996, "Findings should not be discursive; they should not state the evidence or any reasoning beyond the evidence; they should be categorical and confined to those propositions of fact which fit upon the relevant propositions of law."

VII THE FIRST AMENDMENT DOES NOT PROTECT THE DEFENDANTS' LIBEL.

The Plaintiffs complained of a large number of allegedly libelous statements made and distributed by the Defendants. The District Court held that certain of the statements were opinion and others were protected by the First Amendment (Fact 17). But those matters found to be libelous were denominated "secular libel" and are set forth in Fact 17. A review of these statements readily proves that the First Amendment does not provide protection as to them.

CONCLUSION

For the reasons set forth above, the Court is respectfully requested to deny the Petition.

A handwritten signature in dark ink, appearing to read "Stuart I. MacKenzie", written over a horizontal line.

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PROOF OF SERVICE

1 The undersigned hereby declares:

2 I am employed at 1955 Mountain Blvd., Suite F, Oakland, Cal
3 94611. I am over the age of 18 years and not a party to the with-
4 in action.

5 This day I served the attached

6 RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED
7 STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

8
9 by placing a true copy thereof in a sealed envelope, with postage
10 prepaid, in the United States mail at Oakland, Cal, addressed as
11 follows:

Daniel B. Stone
Ivins, Phillips, & Barker
1700 Pennsylvania Ave., NW
Washington, DC 20006

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14
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16
17
18
19 () (State) I declare under penalty of perjury that the fore-
20 going is true and correct.

21 (x) (Federal) I declare that I am employed in the office of a
22 member of the Bar at whose direction this service
was made and hereby certifysaid mailing occurred.

23 Executed on November 30, 1987 at Oakland, Cal.
24
25
26
27
28

